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DEPT. OF WATER RESOURCES
SOUTHERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 66920

BOX CANYON DAIRY, FRANS
AARDEMA, CORNELIA AARDEMA,
THOMAS HEIDA, MARY JANE HEIDA,

Applicant.

SOURCE: Groundwater

County: Gooding

PETITION FOR RECONSIDERATION

COMES NOW Box Canyon Dairy, Thomas and Mary Jane Heida, and Frans and Cornelia Aardema, through their attorney of record Robert E Williams, of the firm Williams, Meservy & Lothspeich, LLP, and petition the Idaho Department of Water Resources (hereafter "IDWR") for reconsideration of the Preliminary Order entered in this matter on December 7th, 2009, with service date of December 8th, 2009. This Petition for Reconsideration is submitted in accordance with IDWR Rule of Procedure 730.02.A

The basis for Applicant's Petition for Reconsideration is as follows:

1. Applicant believes the Preliminary Order to be incorrect for the reason that it reduces the acres for irrigation under Water Rights Nos. 36-2535 and 36-4117 because of partial forfeiture under Idaho Code §42-322(2).
2. Applicant does not believe partial forfeiture should be properly found to exist

with respect to Water Right No. 36-2535 as a result of the transfer for the following reasons:

- (a) The Application for Transfer was originally filed in 1998, under Transfer No. 5500, renumbered to 66920. Prior to filing that Application for Transfer, the Applicant separately filed Transfer No. 5384, subsequently renumbered to 66805. That transfer involved irrigation water from a groundwater source being changed to commercial and stock water to accommodate a new dairy facility owned by the Applicant planned for the N1/2NE1/4 Section 25, and the NE1/4 NW1/4 in Section 25, all in Township 8 South, Range 14 EBM.
- (b) Transfer No. 66805 was protested and heavily litigated. When the prospect of significant litigation became apparent, the Applicant requested in 1999 that Transfer No. 66920 be held and not further processed pending the completion of the approval process for Transfer No. 66805. A Final Order approving Transfer No. 66805 was ultimately issued by IDWR on October 7th, 2005.
- (c) Both Water Rights involved in the current Transfer Application, 36-2535 and 36-4117, were partially decreed in 2001.
- (d) At the time the Application for the present transfer was filed, Applicant intended to convert the SW1/4SW1/4 Section 15, Township 8 South, Range 14 EBM, from crop farming to corrals to contain calves. The Applicant had an adequate existing, lawful water source for the use of the livestock that would be housed in the corrals, and therefore, in 1998 constructed the corrals and ceased irrigating that property.
- (e) Applicant understood that it would not be subject to forfeiture of the intent it owned in Water Right No. 36-2535 by failing to use the irrigation water formerly appurtenant to the SW1/4SW1/4 of Section 15, as well as the additional portion of Water Right No. 36-2535 acquired by Quitclaim Deed from Sand Springs Ranch & Company in June of 1999, formerly appurtenant to the NW1/4NW1/4 of Section 22, Township 8 South, Range 14 EBM. It understood this to be the case because IDWR had agreed to place the Application for Transfer No. 66920 on hold while Transfer No. 66805 was being processed.
- (f) From 2000 on, Applicant used lagoon water from its dairy in Section 25, Township 8 South, Range 14 EBM, to irrigate land within the existing and proposed place of use for Water Right No. 36-4117, as proposed by the present transfer, within Section 25. The use of the lagoon water eliminated the need to use groundwater that would have otherwise been available for irrigation at that location.

- (g) In 2006, after receiving notification from IDWR that there had been a final order issued in Transfer No. 66805, the Applicant notified IDWR that it wished to proceed with the processing of Transfer Application No. 66920. That notification was made to IDWR by Applicant's employee Scott Haag, by telephone on May 8th, 2006.
- (h) It is Applicant's understanding, based on conversations between its employee, Scott Haag, and IDWR personnel, that the processing for Application No. 66920 was delayed for approximately two (2) years because the file containing the approved transfer for Application No. 66805 could not be located.
- (i) In April of 2008, after contact from IDWR, protestant Bill Chisholm withdrew his protest of Transfer No. 66920, thus making that transfer available for approval without a hearing.
- (j) The Preliminary Order Granting Partial Approval of Transfer No. 66920, as proposed, was issued on December 7th, 2009, with a service date of December 8th, 2009. Had the Applicant understood what IDWR apparently meant by "holding" Transfer No. 66920, Applicant could have protected itself by, among other possible measures, placing Water Right No. 36-2535 in the Water Supply Bank. It did not do so because it did not believe the forfeiture period was running while the Application was on "hold".
- (k) Idaho Code §42-223, which provides statutory defenses to the doctrine of forfeiture, provides at Section 3 that "a water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes, including but not limited to, discharge from dairy lagoons used in combination with or substituted for water diverted under the water right." Had the water been transferred to the Water Supply Bank as above provided Applicant could have leased the water under Water Right No. 36-2535 from the Water Supply Bank, and applied it to the new proposed place of use in Section 25, Township 8 South, Range 14 EBM. Applicant did not do so in part because lagoon water was available to provide most of the irrigation needed for this property.
- (l) Idaho Code §42-223(6) provides that "no portion of any water right shall be lost or forfeited for non-use if the non-use results from circumstances over which the water right owner has no control...whether the water right owner has control over non-use of water shall be determined on a case by case basis...". Applicant was not in control of the application approval transfer process in 2006. Had the Application been processed in a timely fashion, the Water Transfer could reasonably have been approved in 2006, before the five (5) year forfeiture date had expired, thus eliminating the applicability of the doctrine of partial

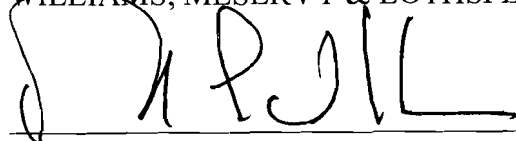
forfeiture to the Transfer. Applicant believes that the timely processing of the Application was not.

- (m) Forfeitures are not favored under Idaho law and are to be avoided if at all possible.

Because of the foregoing, Applicant respectfully requests IDWR to grant this Petition for Reconsideration, and re-issue its Preliminary Order deleting provisions related to partial forfeiture of Water Right No. 36-2535, by providing for a place of use of 74 acres in the W1/2 of Section 25, Township 8 South, Range 14 EBM, with a combined diversion rate of 1.21 cfs for Water Right No. 36-4117 and the transferred portion of Water Right No. 36-2535 and by providing for a place of use of 49 acres within the W1/2SW1/4 Section 15, Township 8 South, Range 14 EBM, with a diversion rate of .71 cfs, for the remaining portion of Water Right No. 36-2535 not transferred.

DATED this 21st day of December, 2009.

WILLIAMS, MESERVY & LOTHSPREICH, LLP



ROBERT E. WILLIAMS
Attorney for Applicant